

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

IME WATCHDOG INC., :
Plaintiff : 22-CV-1032(PKC)

-against- :
SAFA ABDULRAHIM GELARDI, : United States Courthouse
Defendant. : Brooklyn, New York

December 6, 2022
3:00 p.m.

- - - - - X

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MILMAN LABUDA LAW GROUP PLLC
3000 Marcus Avenue, Suite 3W8
Lake Success, NY 11042

BY: EMANUEL KATAEV, ESQ.

For the Defendant: WARNER & SCHEUERMAN
6 West 18th Street, 10th Floor
New York, NY 10011

BY: KARL SCHEUERMAN, ESQ.

Court Reporter: Andronikh M. Barna
225 Cadman Plaza East
Brooklyn, New York
(718) 613-2178

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 THE COURTROOM DEPUTY: Civil cause for a premotion
2 conference. Docket 22-CV-1032. IME WatchDog, Inc. versus
3 Gelardi, et al.

4 Will the parties please state their appearances for
5 the record, starting with plaintiff.

6 MR. KATAEV: Good afternoon, everyone. My name is
7 Emanuel Kataev of Milman Labuda Law Group, PLLC for the
8 plaintiff.

9 THE COURT: Good afternoon, Mr. Kataev.

10 MR. SCHEUERMAN: Good afternoon, Your Honor.
11 Karl Scheuerman from Warner & Scheuerman for the
12 defense.

13 THE COURT: Good afternoon, Mr. Scheuerman.

14 So we are here on the premotion conference request
15 of defendants to file a motion to dismiss as to the amended
16 complaint that was filed in October by the plaintiff in this
17 case, IME WatchDog.

18 And I guess I want to just at the outset,
19 Mr. Kataev, remind you, because your papers are somewhat
20 unclear at times, that there is only one plaintiff in this
21 case, in that Ms. Levi is not a plaintiff. At various points
22 you refer to the plaintiff as a "she," for example, so
23 obviously that is an error. It is IME WatchDog that is the
24 plaintiff and then there are a number of defendants on the
25 other side, seven individuals now in one corporation in the

1 amended complaint.

2 But the reason I wanted to meet with the parties is
3 because given my familiarity with this case, I have a serious
4 concern that it is getting mired down in unduly acrimonious
5 and wasteful litigation by both sides, quite frankly. I was
6 concerned when the plaintiff filed the request for attorney's
7 fees after only securing a preliminary injunction, which, to
8 my mind, was premature and quite unusual. But now I am
9 presented with this motion to dismiss request by the defense,
10 which I think -- and I will explain why in detail -- is
11 non-meritorious and I think would be extraordinarily wasteful
12 to file.

13 And so let me turn everyone's attention to this
14 proposed motion. Again, to set the record straight, the
15 plaintiff here incorrectly says that Judge Cho allowed
16 plaintiff to amend in this matter based on the merits of the
17 motion to amend that the plaintiff had filed. That is
18 incorrect. Judge Cho simply allowed plaintiff to amend
19 because it was still within the period that plaintiff could do
20 so as of right. So Judge Cho did not pass at all on or
21 consider the merits of the motion to amend that was filed
22 which are essentially being re-raised, effectively, in the
23 motion to dismiss that now the defense wants to bring.

24 I would urge you, Mr. Scheuerman, not to file that
25 motion to dismiss because I will summarily deny it, and I will

1 tell you why. And I understand I cannot tell you not to file
2 something, especially a motion, but I do want you to
3 understand that there is no percentage in that motion. The
4 arguments you want to make are either ones that I have already
5 rejected in the context of the motion for fees that was filed
6 before or otherwise.

7 So, first of all, you say that the plaintiff has
8 failed to allege that any defendant made a defamatory
9 statement which was of and concerning IME, which is the
10 plaintiff corporation. You point out that Ms. Gelardi -- and
11 for the court reporter's sake, if I refer to Ms. Gelardi, the
12 spelling is G-e-l-a-r-d-i, first name Safa, S-a-f-a, and she
13 is one of the defendants -- that her GoFundMe page did not
14 actually name the lawsuit or the company, IME WatchDog. But
15 what is clearly incorrect about that and unavailing about that
16 is, as is laid out in the amended complaint, the GoFundMe page
17 is linked to Ms. Gelardi's Facebook page in which there are
18 clear references to the precise lawsuit. In fact, there is
19 someone who responds and pulls up the actual opinion that I
20 issued relating to the preliminary injunction where I made
21 findings that the defendants had actually stolen the
22 information that they are alleged to have stolen, or at least
23 that there was a strong likelihood of success on that based on
24 the evidence presented to me. And then there is a specific
25 identification of exactly the case, the business,

1 IME WatchDog. So there is no doubt here that that is the
2 business that is being defamed when you link the two together.
3 And they are linked together by Ms. Gelardi herself. As I
4 said in my prior decision, and I address specifically the
5 request to file defamation claims at that time, I gave very
6 specific warnings to Ms. Gelardi about what I would find would
7 be per se defamation. I do not necessarily want to read the
8 entire docket order into the record, but it is dated June 10,
9 2022. At that time, I specifically said what you are saying
10 now, which is not correct, Mr. Scheuerman, that at that time,
11 the statements that were being recited to me did not contain
12 any identifying details about Levi or WatchDog, that
13 Ms. Gelardi did not identify the kind of business she was in,
14 the clients that she served, or other identifying information
15 that would lead someone who knows Levi or WatchDog to conclude
16 that the statements concern them. That is entirely different
17 now because of the facts that have been brought out in the
18 amended complaint, that Ms. Gelardi specifically linked her
19 own Facebook page which expressly now identifies exactly the
20 business, exactly the case, exactly the players involved:
21 Ms. Levi and WatchDog. So the circumstances that I had
22 previously found did not exist before and thus did not support
23 the plaintiff's effort then to get contempt, actually, that
24 was the context, for defamation, now exists. Or they always
25 existed, but now those facts are being amended in this amended

1 complaint. So my finding that that would constitute
2 defamation per se governs here. It has basically been revived
3 or brought to life by the new facts that have been discovered
4 and now are alleged in the amended complaint.

5 So this addresses the second argument that you
6 propose to make in your motion to dismiss, that there are no
7 defamatory statements by Ms. Gelardi but rather they are
8 subjective opinions posted on social media rather than
9 assertions of facts capable of being proved false. I already
10 rejected that argument before. These are the same statements
11 about the business was doing so well, we caught up with our
12 number-one competitor, the attorney is greedy and ruthless,
13 et cetera, et cetera. Again, at the time, the only reason I
14 did not find per se defamation against Levi and WatchDog was
15 because they were not specifically identified. But again,
16 that is all in the past because the facts now are clear that
17 Ms. Gelardi did link Levi and WatchDog specifically to the
18 defamatory statements. The ones that I said before were
19 per se defamatory. And again, that is in the opinion that I
20 wrote. I specifically said neither does the Court agree that
21 Safa Gelardi's statements are mere opinions. Had they
22 identified WatchDog or Levi in any manner, they would have
23 been defamatory per se. So I have already rejected that
24 second argument that you proposed to me because I reviewed
25 those same exact statements and found them defamatory, but

1 they had not yet, or at least I was unaware that they had been
2 connected to Levi and WatchDog.

3 And then the third argument that you propose to make
4 is that the plaintiff has failed to plead special damages and
5 therefore the amended complaint is defective. That is just
6 wrong as a matter of law based on my prior finding that the
7 statements, that are not opinions but are actually defamatory
8 statements, are per se defamatory, and in that situation you
9 do not have to plead special damages. So the case of
10 *Thi versus Cayre Group Limited*, 726 F. Supp 323, Southern
11 District of New York, 2010 stands exactly for that
12 proposition. Under New York law, a defamation claim must
13 either constitute defamation per se or cause special damages.
14 And so because I ruled that these statements, if connected to
15 WatchDog or Levi, would be defamatory per se, then special
16 damages do not need to be pled. So that would not be a valid
17 basis for dismissing the amended complaint.

18 And then finally, the fourth basis upon which you
19 want to move is your argument that there is no basis for
20 liability against IME Companions, defendant company, because
21 the plaintiff concedes that the statements in question had
22 been made by Safa Gelardi rather than Companions. And so you
23 argue that there is not enough of a connection between the
24 statements made by Ms. Gelardi on her Facebook page and the
25 Companions company, or I should say on the GoFundMe page. So

1 I guess Ms. Gelardi made those on the GoFundMe page. But
2 again, if you connect as Ms. Gelardi did, basically by linking
3 her Facebook page to her GoFundMe page, if you connect those
4 two, it is clear that the claims, or these defamatory
5 statements rather, are being made against Levi and WatchDog
6 because the case it specifically referenced talks about
7 WatchDog and the statements say the business was doing so
8 well. So she is clearly speaking on behalf of her company,
9 IME Companions.

10 And actually, my focus in my prior sentence was
11 wrong. The argument you want to make is that there is not
12 enough of a connection between Gelardi and Companions in her
13 making those statements. The plaintiff has responded that the
14 icon or the logo for IME Companions appears on the Facebook
15 page of Ms. Gelardi. That is certainly some evidence by which
16 someone would link these statements, these defamatory
17 statements to Companions, but probably in and of itself not
18 enough because people can put all sorts of logos on their
19 Facebook page. For example, if someone likes to drink Coke a
20 lot, they can put Coke in their little bubble there or a
21 picture of them drinking Coke, but that would not necessarily
22 attribute all of their statements to The Coca-Cola Company.
23 But here, the statements themselves combined with the IME logo
24 indicates that that is exactly what she is talking about, her
25 business. She says: The business was doing so well, we

1 caught up with our number-one competitor. So clearly everyone
2 in this area of business, and it is not a big world, would
3 know exactly who Gelardi is talking for and who she is talking
4 about, that she is talking about her company, IME Companions,
5 and her number-one competitor, which is made clear by the
6 linkage to the Facebook page, plaintiff's company,
7 IME WatchDog.

8 So to me, this amended complaint sets forth a claim
9 for per se defamation, at least based on the standard that
10 applies here at a complaint stage, which is plausible
11 inference. So I would find that your motion to dismiss, as
12 you have proposed it, would not be successful, so I urge you
13 not to file it. I, of course, cannot order you not to file
14 it, but I do not want you wasting your time or your client's
15 resources, nor the resources of the plaintiff and their
16 attorney, or its attorney, to respond. And as you can tell,
17 attorney's fees is a very -- it is a source of litigation in
18 this case; it should not be at this time. But you might only
19 just incur more potential claims for attorney's fees if you
20 file this. So it is up to you, but I am giving you the
21 benefit of my analysis. Because there is really not much more
22 for me to look at other than the complaint and your arguments
23 which you have set forth pretty clearly in your letters, in
24 both of your letters.

25 So that is what I wanted to explain to you. I will

1 give you some time to think about what you want to do.

2 And I am happy to hear from either side if you would
3 like to be heard at this time.

4 MR. SCHEUERMAN: Yes, I do, Your Honor.

5 THE COURT: Go ahead, Mr. Scheuerman.

6 MR. SCHEUERMAN: My problem here is, as you pointed
7 out in your first statements to plaintiff's counsel is,
8 there's a conflating here of the plaintiff and the plaintiff's
9 principal and they're not one and the same for the purposes of
10 defamation law. And there's also -- and because of this
11 conflation, there's also an inherent contradiction in the
12 nature of the claim. The claim is that it's defamation per se
13 because it goes to the profession; i.e., lawyer, greedy
14 ruthless lawyer. That's the crux of the defamation claim,
15 greedy ruthless lawyer. That's what makes it defamation
16 per se, correct?

17 THE COURT: Hang on.

18 That is abusing the law. That would suggest that
19 the business, along with the greedy, ruthless lawyer, are
20 abusing the law, right? To sue me out of business because she
21 has the means to do so.

22 MR. SCHEUERMAN: But in order to be defamation
23 per se, it has to go to the profession of the plaintiff. The
24 plaintiff is an IME watchdog that works for lawyers. The
25 plaintiff's principal is a lawyer. The alleged defamatory

1 statements allude to a lawyer and they allude to a female
2 lawyer with the pronoun "she" and "her" scattered throughout
3 the statements. They don't refer in any -- they don't in any
4 way impugn upon the plaintiff itself ability to conduct its
5 business, its performance and ability of the business, how it
6 performs its business. It doesn't call IME WatchDog a corrupt
7 company that can't be trusted to work for plaintiff's lawyers
8 in personal jury cases, doesn't accuse them of any fraudulent
9 conduct in their business or any dishonesty in the performance
10 of its business. The only allegation that has a connection to
11 a profession is to the individual, Ms. Levi, who is not the
12 plaintiff in this case. So they're getting around what is
13 happening here because plaintiff is getting around the special
14 damages requirement by saying it's per se because you said
15 greedy, ruthless lawyer. But the plaintiff isn't a lawyer.
16 Now, if the plaintiff here was the Law Offices of Daniella
17 Levi or, you know, Daniella Levi & Associates, then I wouldn't
18 want to make the motion, but the plaintiff is IME WatchDog;
19 IME WatchDog does not practice law. So I don't understand how
20 a statement regarding to a -- referring to an attorney can be
21 deemed defamation per se to a company that doesn't practice
22 law. Because in order to be per se, it has to impugn that
23 business's ability to perform its job, integrity in the
24 performance of its job, and competence, fitness, et cetera.
25 Nothing was said about IME WatchDog that they could not be

1 trusted by plaintiff's lawyers to be hired to serve as
2 watchdogs on their behalf in personal jury cases. Nothing was
3 said. The only allegations pertain directly to Ms. Levi, who
4 is not a plaintiff in this case.

5 THE COURT: But how is it not disparaging the
6 business to say that Levi and WatchDog, because WatchDog is
7 the plaintiff, are simply suing them to run them out of
8 business? I mean, an aggressive litigation strategy that she
9 claims is based on false claims, how does that not disparage
10 the company and falsely?

11 MR. SCHEUERMAN: But again, so that could serve as
12 the basis for a defamation claim, but not defamation per se;
13 because per se has to impugn the business of the plaintiff in
14 the performance of its business, its integrity, its
15 competence, its fitness, its qualifications. You can't say
16 IME WatchDog are a bunch of criminals and crooks who don't
17 show up for IMEs. You can't say that. But there's nothing
18 wrong with referring to its principal, who is not a plaintiff,
19 as a ruthless and greedy attorney.

20 THE COURT: But let me ask you a question. You are
21 saying that accusing, which is how I read these statements
22 when you put the two together, the two different pages
23 together, but accusing IME WatchDog, the plaintiff, of
24 bringing a purely frivolous lawsuit to bully her company into
25 bankruptcy is not defamation of the company?

1 MR. SCHEUERMAN: No.

2 THE COURT: Because it is about the lawsuit being
3 brought against them based on false charges and being used to
4 simply run them out of business improperly. You are sort of
5 drawing this distinction between saying aggressive tactics
6 such as that because they used the legal system versus the
7 delivery of the services they provide means that it cannot be
8 defamation per se.

9 MR. SCHEUERMAN: Yes.

10 THE COURT: What case stands for that proposition?

11 MR. SCHEUERMAN: Every case.

12 It has to impugn upon the quality of the work, the
13 integrity of the work, not the integrity of the individual who
14 heads the company.

15 THE COURT: No, no. But again --

16 MR. SCHEUERMAN: What they're doing here is they're
17 bootstrapping --

18 THE COURT: No, no, no, no. Stop, stop, stop.
19 Please.

20 You keep focusing on Levi. I am saying to you, I
21 construe these statements, when read together, as accusing
22 WatchDog, the company, of pursuing an aggressive litigation
23 strategy. Because they are the only ones who are suing,
24 right? It is WatchDog, plaintiff, is suing her company, and
25 her, she would say based on false accusations simply to bully

1 them out of business. And that is what your client,
2 Ms. Gelardi, is effectively saying. You keep recasting it as
3 her only accusing Levi of this because of the one statement
4 about a ruthless attorney. But the reality is, when you put
5 all of this together, it is a law firm. I mean, sorry, it is
6 the company, WatchDog, that is the plaintiff. And so clearly
7 the company's reputation as an overly aggressive, unfairly
8 competing business is being disparaged. You cannot avoid that
9 conclusion.

10 MR. SCHEUERMAN: That has nothing to do with how it
11 conducts its business. That's how it deals with its
12 competitors.

13 THE COURT: Right. You are saying that that cannot
14 form the basis of defamation per se?

15 MR. SCHEUERMAN: Correct. They're bootstrapping the
16 per se because the allegations at the lawyer.

17 THE COURT: So what case says that? That is what I
18 am asking you.

19 MR. SCHEUERMAN: Well, I haven't looked for an exact
20 case saying that, but the general law is, for it to be
21 defamation per se, it has to impugn to the plaintiff
22 dishonesty, misconduct, incapacity, unfitness, or lack of any
23 necessary qualification in the exercise of its business.

24 THE COURT: Wait. Wait.

25 MR. SCHEUERMAN: Suing competitors is not the

1 exercise of its business. Attending IMEs for plaintiff's
2 lawyers is the exercise of its business.

3 THE COURT: I am not sure I agree with you on that.
4 Pursuing a litigation strategy where you sue somebody for
5 stealing your trade secrets is certainly a function of the
6 business. Going after competitors who you claim have stolen
7 your secrets and doing it dishonestly is what she is alleging;
8 we did not steal anything, yet they are suing us. How is that
9 not still part of conducting their business?

10 MR. SCHEUERMAN: Because they aren't retained by
11 plaintiff's lawyers to deal with their own competitors.
12 They're retained by plaintiff's lawyers to attend physical
13 examinations on behalf of personal injury plaintiffs. What
14 they do with their competitors, how they deal competitors, how
15 they deal with former employees, et cetera, has nothing to do
16 with how they conduct their business. The defamation, to be
17 per se, has to be with respect to the actual conduct of its
18 business.

19 THE COURT: Well, let me just say this. You can
20 keep repeating that.

21 MR. SCHEUERMAN: Okay.

22 THE COURT: But again, and this is -- I am looking
23 at the letter written by Mr. Warner, your partner, the cases
24 he cites focus on the individual versus the company, so
25 Ms. Levi, attacking Ms. Levi versus her company. You do not

1 cite me cases, and you are going to have to, to support this
2 claim that somehow pursuing litigation, a company pursuing
3 litigation against a competitor alleging theft of trade
4 secrets is not part of its business, is not part of it running
5 its business. You are focused solely on and, I do not know,
6 if you are right, you are right, but nothing in your letter
7 says to me you are right. You say you do not know any cases
8 off the top of your head. Clearly the letter you wrote or
9 your partner wrote or submitted does not suggest that that is
10 the case. But you can bring your motion and make that
11 argument. But I hope you understand that the other arguments
12 you have made, although obviously if it is not defamation
13 per se, then the failure to plead special damages could be an
14 argument about the deficiency. But the other statements about
15 linkage, I think there is enough to allege a linkage between
16 your client speaking on behalf of IME Companions and also
17 about what are defamatory statements, I believe, about the
18 company. But you need to make your argument about that then
19 when you make your motion and find case law that supports
20 that.

21 It does not make sense to me that somehow the
22 definition of conducting one's business is limited simply to
23 the services that one provides or the products that one
24 produces, but could include how they go about fending off
25 competitors, like, you know, predatory pricing.

1 Let's suppose they were accused of predatory pricing
2 falsely. Would you say that that cannot be defamation?

3 MR. SCHEUERMAN: No, that, to me, is a type of
4 defamation per se.

5 Improper billing, improper --

6 THE COURT: But somehow suing --

7 MR. SCHEUERMAN: -- a poor product, incompetence,
8 unfitness, unqualified, that's what the general rule is. I
9 have not located or looked for a case with this specific fact
10 pattern, and one may not be around.

11 But I just don't understand how something that's
12 done outside of the practice of the business is per se,
13 defamation per se to the -- pertaining to the conduct of the
14 business itself. She did not say anything which impugned upon
15 how they conduct their business on behalf of plaintiff's
16 lawyers.

17 THE COURT: Listen. Again, I would like to see the
18 case law. Because as a matter of common sense and factual
19 reality, I think the litigation strategy a company pursues
20 could be how they conduct their business. Because the
21 allegation -- I mean, I do not think an individual, for
22 purposes of defamation law, should be able to say, without a
23 basis in reality, that a company is suing them solely to put
24 them out of business because they are competing so well and
25 based completely on false allegations. I do not know how that

1 cannot be a form of defamation per se, because it certainly
2 relates to how the company conducts itself and it relates to
3 the honesty of the company. You just read that statement a
4 moment ago about honesty and how it conducts its business. I
5 view litigation strategy or litigation it undertakes or
6 anything related to the law -- let's say, for example, they
7 have to file forms with the State Department of New York,
8 which I assume is true, I do not think you can say that they
9 did that illegally and get -- and if it is false, get away
10 with not engaging in defamation. It certainly has to do with
11 how they conduct their business, but it does not have to do
12 with providing the actual services. You would have that
13 definition so thinly and narrowly defined that it would
14 exclude a lot of things that businesses do undertake in order
15 to run their business. I do not know if you are right. If
16 you find the case, I could be persuaded. But on the face of
17 it, that strikes me as contrary to common sense in the way and
18 the purpose of the law.

19 MR. SCHEUERMAN: Well, I will do some researching
20 before we make a decision. I take Your Honor's words under
21 advice.

22 THE COURT: Yes.

23 Let me also point out to you that the case law also
24 says that a false statement constitutes defamation per se when
25 it charges another with a serious crime or tends to injure

1 another in his or her trade, business or profession. And that
2 comes from the case of *Geraci versus Probst*, 61 A.D.3d at 718.
3 That is a New York Supreme Court case. And that, at least
4 that statement, does not at all seem to cabin in or even make
5 contingent on the business that is being conducted IN whether
6 or not the alleged bad act related directly to the conduct of
7 a company's business, but rather focused on the nature of the
8 statement, the allegedly defamatory statement made by the
9 maker and its impact on the allegedly defamed party. So
10 regardless of whether or not it has to do with how their
11 business was conducted, the question is: Did it injure his or
12 her trade or business? I guess that in some ways could apply
13 to Levi. But she is not the plaintiff here, so I guess that
14 is --

15 MR. SCHEUERMAN: That's my problem here.

16 THE COURT: Well, no, that could be a limitation on
17 that concept.

18 But again -- but again -- I do find there is enough
19 of a connection to the statements your client made, which is
20 basically about the business, WatchDog, because WatchDog is
21 the plaintiff. And so if, in fact, bringing a lawsuit could
22 be deemed as part of running one's business or if there really
23 is not such a narrow construction of what the defamation has
24 to relate to, I do not see a problem with WatchDog bringing
25 the defamation claim based on the statements that were made.

1 It is clear, to me at least, that the statements themselves
2 are impugning what WatchDog is doing in terms of bringing the
3 lawsuit, even though obviously it also is against Levi
4 herself. And I will say this. Based on the links to the case
5 itself, the fact that Ms. Levi is really, for all practical
6 purposes, WatchDog, the company, I think draws a nexus between
7 her and WatchDog, the plaintiff, much closer.

8 But you should brief your motion then, because I can
9 hear that you are not dissuaded from doing so. You think you
10 have a good argument. Like I said, I am giving you the
11 benefit of my thoughts already. But I think as a matter of
12 factual allegations, there is enough here to connect your
13 client as making a statement on behalf of IME Companions and
14 her statements going against or being about both Levi and
15 WatchDog, because of the direct reference to the lawsuit and
16 the players in the lawsuit and the plaintiff in the lawsuit,
17 which is WatchDog. I also preliminarily disagree with you
18 that that cannot be defamation per se as to WatchDog, but that
19 is, I guess, going to be the point you are going to try to
20 make in your motion.

21 How much time do you want to file your motion?

22 MR. SCHEUERMAN: Whatever the Court thinks is best.

23 THE COURT: I do not have any view. Do you want
24 30 days?

25 MR. SCHEUERMAN: 30 days would be great, Your Honor.

1 THE COURT: Okay.

2 Also, you need to enter your appearance, I think, in
3 this matter.

4 MR. SCHEUERMAN: Yes. I was unaware. I operated on
5 my partner's PACER account.

6 THE COURT: Okay. All right.

7 MR. KATAEV: Your Honor, may I address some of these
8 issues before we go to the schedule?

9 THE COURT: Yes. Go right ahead.

10 MR. KATAEV: Thank you.

11 So I imagine that because IME WatchDog Inc. is a
12 corporation duly formed under the laws of the State of
13 New York, that its certificate of incorporation probably says
14 -- I haven't seen it -- that it is authorized to perform any
15 lawful act in furtherance of its business. That's a statement
16 that's designed to explain the scope of its business. And if
17 it says something like that, which most certificates of
18 incorporation do, I would submit that any act that it takes,
19 including bringing litigation, is within the scope of its
20 business. It's not limited to solely scheduling IMEs and
21 having observers attend them and so on and so forth. It's,
22 broadly speaking, anything and everything that it does
23 lawfully. And it is lawful to bring a lawsuit, and it did so.
24 So I would argue that and I share that with opposing counsel,
25 for him to consider that argument before deciding whether or

1 not defendants wish to pursue that motion.

2 And I'm also confused about this
3 it's-plaintiff-not-Levi and you're focusing on Levi and not
4 plaintiff. I cited extensive case law on this subject, that
5 courts have allowed claims where the statement did not
6 identify the plaintiff but named an individual who was
7 understood to represent the plaintiff. Mrs. Levi is the
8 principal of the plaintiff. She formed the entity. She is
9 the face of that company. In the complaint she talks about
10 how extensively she worked to have all these law firms come to
11 her to have these services performed. Because she's a
12 personal injury attorney, when she was in court she would
13 speak to her colleagues and talk about the business. That's
14 how she built it up, from the ground up. So she is, in
15 essence, the plaintiff. Any derogatory remark against her,
16 setting aside the fact that she's an attorney, is against the
17 plaintiff.

18 There is another case that I cite. The first case
19 is *Daytree*. It's an Eastern District of New York decision
20 from 2018. I didn't cite which judge. It says that a
21 statement about a company -- it's the reverse here, I
22 acknowledge that -- *Daytree* was of and concerning two
23 individuals.

24 THE COURT: Can I stop you.

25 I do not think that is a discussion anymore. I

1 agree with you that the letter filed by Mr. -- what is your
2 partner's name?

3 MR. SCHEUERMAN: Warner.

4 THE COURT: -- Mr. Warner focused on the individual
5 versus the company.

6 But the argument Mr. Scheuerman is making is
7 different.

8 MR. KATAEV: Okay.

9 THE COURT: He is saying you can only defame a
10 company by attacking how it provides its services, not by how
11 it carries out other aspects of its business, by filing
12 litigation. Because they are not in the business -- they are
13 not lawyers, for example, I guess is the argument -- you
14 cannot defame them for bringing a false lawsuit. That is what
15 he is arguing. And that is essentially what this -- that is
16 the thrust of the defaming statement, which is that they are
17 bringing a false lawsuit simply to drive us out of business.
18 So Mr. Scheuerman's more nuanced argument, but different than
19 what his partner argued, as one of the bases is that that
20 cannot be defamation as to a company that is not in the
21 business of suing people.

22 MR. KATAEV: Yes, but in fairness, he's making both
23 arguments, this argument that you just discussed and the other
24 one.

25 THE COURT: Well, I reject the argument that there

1 is any daylight between Ms. Levi and the company because of
2 some of the reasons that you said, but more because ultimately
3 everything is linked back to the actual case and WatchDog is
4 clearly the business and the business is referred to
5 throughout this allegedly defaming statement. At the end it
6 says: This is another example of big companies putting anyone
7 who wants to compete with them out of business. So, clearly
8 defaming WatchDog directly, regardless of Ms. Levy being the
9 focus of the beginning part to some extent. But she is sort
10 of the actor or the person who is, I would say, pushing the
11 company, and it is clear, to do that. But there can be no
12 mistake or doubt, I do not think, and it is certainly a
13 reasonable inference, that the statement is actually defaming
14 both WatchDog and Ms. Levi because it says this is what big
15 companies do to put their competitors out of business.

16 Mr. Scheuerman, your only, and the only argument I
17 really am interesting in looking at, because I have resolved
18 everything else based on what I have seen, is, is there any
19 case law to support the notion that you cannot defame a
20 company for engaging in overly aggressive litigation, or
21 something else, whatever it is, that is not at the core of the
22 services they provide or the actual business, if you want to
23 call it that, that they are in.

24 MR. SCHEUERMAN: If I may, Your Honor?

25 The question isn't whether it's defamatory, whether

1 it's defamatory per se. Because if not per se, they have to
2 plead special damages, and they only pled general damages
3 here.

4 That, to me, is the --

5 THE COURT: Okay.

6 MR. SCHEUERMAN: Is the issue as Your Honor sees it
7 at this point in time, correct?

8 THE COURT: Right. Well --

9 MR. SCHEUERMAN: Well, potential issue.

10 THE COURT: I mean, yes, I think that --

11 MR. SCHEUERMAN: I don't want to be presumptive.

12 THE COURT: Well, are you conceding that it is
13 defamatory to the company, but is not necessarily defamatory
14 per se?

15 MR. SCHEUERMAN: I don't believe it's defamatory,
16 Your Honor.

17 THE COURT: Well, right. That is --

18 MR. SCHEUERMAN: I really don't. I really don't.

19 But I appreciate your position, your opinion. And I
20 understand that you want me to focus on whether or not it's
21 defamatory per se to the company.

22 THE COURT: No, actually, I want you to focus on
23 your argument, which is you say it is not defamatory unless it
24 attacks what a company does as its primary business. That is
25 your argument.

1 MR. SCHEUERMAN: No, not -- defamatory per se. The
2 question is, is it defamatory per se.

3 THE COURT: Okay. So you are acknowledging that it
4 could be defamatory in terms of attacking the honesty of the
5 company. You are saying that it is not defamatory per se and
6 that only implicates the issue of special damages.

7 MR. SCHEUERMAN: Well, it's clear you don't want to
8 hear a debate this afternoon on whether or not it's
9 defamatory.

10 But my -- so my position in light of that is there's
11 an issue whether that could be defamatory per se. Because if
12 not defamatory per se, then the plaintiff has to plead special
13 damages and she has not. It has not. Excuse me.

14 THE COURT: Okay. Remember, we have a court
15 reporter.

16 MR. SCHEUERMAN: I apologize.

17 THE COURT: Yes, I do not want to debate at length
18 anything with you, only because I have not seen any case law.

19 MR. SCHEUERMAN: Yes.

20 THE COURT: But I want you to understand that you
21 should, in your written motion, make whatever argument you
22 think is appropriate and legally supportable. If your
23 argument is that there can be no defamation, period, as to a
24 company if the attack is not about the provision of its
25 services, then you should make that argument, obviously. If

1 that is correct as a matter of law, then you would be able to
2 move, you would be successful in dismissing those claims in
3 the amended complaint. But you are a bit of a moving target
4 on this. I am not sure I understand what your argument is,
5 and maybe because you have not looked at the case law. If you
6 are limiting your argument to you cannot find or it is not
7 enough for defamation per se if you are not attacking the
8 services or if the statements do not relate to the services
9 provided, then make that argument. So I am not telling you
10 not to make an argument if you think you have one. I just
11 have not seen any case law that supports that.

12 And in the letter written by your partner, the focus
13 was on whether or not the statements that talk about Ms. Levi
14 are really about WatchDog, are really defaming WatchDog, which
15 is a separate issue. And I am telling you on that, I find
16 that the statements on their face are defaming both of them
17 because it references her and it references her business and
18 it references the business trying to put Ms. Gelardi's
19 business out of business, to use that word three times in one
20 sentence, and so I do not think there is any real argument to
21 be made that the allegedly defaming statement is only about
22 Ms. Levi, even though it says she is greedy and ruthless.

23 MR. SCHEUERMAN: It's difficult to fully brief each
24 issue on a three-page limit, Your Honor.

25 THE COURT: Understood. Understood.

1 But, I mean, I think what you are arguing, it
2 strikes me as counterintuitive. But if there is case law
3 supporting it, then you should brief that.

4 Mr. Kataev, I only cut you off because I do not
5 think, based on my opinion, there is any real argument to be
6 made that somehow the statements are only about Ms. Levi.
7 That argument, I would reject. It is clear to me on the face
8 of it, especially when you link it to the actual case itself
9 and her Facebook page and the extended discussion that she
10 gets into with one of the repliers or responders or
11 commenters, it is pretty clear that she is defaming both the
12 company and Ms. -- I would say, defaming both the company and
13 Ms. Levi.

14 MR. KATAEV: For the benefit of my understanding as
15 to the Court's initial comment about my referencing "her"
16 instead of "it," the company, that's mutually exclusive from
17 this; is that right?

18 THE COURT: Well, I am just noting it as a matter of
19 --

20 MR. KATAEV: Grammar?

21 THE COURT: Yes. Grammar and carefulness, right?
22 Because you should not be referencing plaintiff as "she"
23 because she is not a plaintiff.

24 MR. KATAEV: I will be more mindful.

25 THE COURT: Right. That is all.

1 But, you know, I understand your position that they
2 are interchangeable as a legal matter, but I think that you
3 have to argue based on some facts. Just rhetorically, you
4 will have to be careful about referencing the plaintiff as the
5 company.

6 MR. KATAEV: Understood.

7 THE COURT: All right. So 30 days to file your
8 motion.

9 THE COURTROOM DEPUTY: January 5th, 2023.

10 THE COURT: And then 30 days to respond.

11 MR. KATAEV: Generous.

12 MR. SCHEUERMAN: And no reply, Your Honor?

13 THE COURTROOM DEPUTY: Response due February 6th.

14 THE COURT: And then two weeks for the reply.

15 THE COURTROOM DEPUTY: Reply is due February 20th.

16 MR. KATAEV: And to assist opposing counsel in
17 making his motion, the opposition papers will include a
18 request for leave to replead if there is a dismissal. I have
19 case law supporting that position.

20 THE COURT: Well, I mean, let me ask you a question.
21 Is there something you would do to fend off this motion?

22 MR. KATAEV: The only thing I could think of,
23 Your Honor, that might persuade the other side not to move
24 forward with the motion practice, which anecdotally in
25 convincing the other side not to do it takes away the argument

1 that we're aggressively suing in order to raise attorney's
2 fees to put them out of business, is to plead special damages
3 in the event it's found not to be defamation per se as an
4 alternative argument.

5 THE COURT: Well, can you plead special damages?

6 MR. KATAEV: I have to investigate that.

7 THE COURT: Well, if you can, I suggest you do so
8 because it may end up short-circuiting this process.
9 Especially if it turns out Mr. Scheuerman's argument is that
10 unless the defamatory statements relate to the company's
11 functioning, its basic functioning, you have to plead special
12 damages, then maybe you could, you know, interrupt that
13 process. If you think you can, just let Mr. Scheuerman know
14 so that neither side wastes time briefing it. I am not sure
15 it will necessarily convince Mr. Scheuerman that he does not
16 want to file something, and obviously that is their right, but
17 you might save yourselves money. Your client's money, that
18 is. Okay?

19 MR. KATAEV: May I propose a deadline of the 19th
20 for me to make that motion to amend or application?

21 THE COURT: Well, I mean, I guess you can let us
22 know by the 19th of this month.

23 MR. KATAEV: Yes.

24 THE COURT: Yes, that is fine. If you want to file
25 something and advise myself and Mr. Scheuerman, that would be

1 good. Probably more effective, though, is for you to explain
2 to Mr. Scheuerman how you plan to amend.

3 MR. KATAEV: In advance of that. Yes, of course.

4 THE COURT: Right. Well, whether they will be
5 satisfied or not. So it is less important to let me know as
6 it is to let the other side know to see if that dissuades them
7 from filing the motion.

8 MR. KATAEV: Understood.

9 THE COURT: Whatever happens though, if no motion is
10 filed, then, Mr. Scheuerman, you certainly should let us know
11 on the due date that you are not filing a motion. Okay?

12 MR. SCHEUERMAN: Yes, Your Honor.

13 THE COURT: Now, the other thing is, I do prefer
14 that the parties do what is called bundling, which means that
15 you, Mr. Scheuerman, would not actually file your motion on
16 the due date, but you would simply serve it on plaintiff, but
17 you would file a letter indicating you had served it, so your
18 cover letter indicating service. And then Mr. Kataev would do
19 the same in terms of the plaintiff's opposition, serve it but
20 not file it, but file the letter indicating service. And then
21 on the last day, final day, which is the reply date, both
22 sides would file their respective pleadings.

23 The reason I ask you to do this, but I cannot force
24 you to do it, is because it allows me to be more liberal with
25 extensions because the date that you file your motion starts

1 an internal clock ticking in terms of getting the decision
2 just done. And so obviously once you start that clock
3 ticking, it makes it harder for me to expand the time,
4 especially depending on, you know, how much time you want.
5 Okay?

6 So like I said, if you think though, however, you
7 are going to run against some other deadline that is important
8 or filing later would affect something else, you could file it
9 whenever you want to. Again, I cannot force you not to do
10 that. Okay?

11 MR. SCHEUERMAN: Thank you, Your Honor.

12 THE COURT: All right. So, Mr. Scheuerman, you will
13 enter your appearance through whatever PACER portal you want
14 to.

15 All right. I look forward to hearing from you,
16 folks. If you can work it out, I think it would be best and
17 maybe just move on with this case, but obviously you have to
18 pursue whatever strategy is most appropriate for your client.
19 Okay?

20 MR. KATAEV: Judge, I do have one other concern I
21 would like to raise.

22 THE COURT: Yes.

23 MR. KATAEV: With respect to discovery, currently
24 the deadline for the close of discovery is January 20th. We
25 have not received any documents from the forensic analyst.

1 There is --

2 THE COURT: Yes. I said you should take this up
3 with Judge Cho.

4 MR. KATAEV: Understood.

5 THE COURT: Okay. Because I think we ended up
6 extending, maybe, the deadline. But otherwise, if there is
7 some dispute about discovery, take it up with Judge Cho.

8 MR. KATAEV: Including an extension?

9 THE COURT: Yes. Because I think the last order we
10 said was from now on Judge Cho would deal with any extensions.

11 MR. KATAEV: Understood, Your Honor.

12 THE COURT: Yes.

13 MR. SCHEUERMAN: Thank you, Your Honor.

14 THE COURT: Thank you, everyone. Have a good
15 holiday.

16 MR. KATAEV: Great to see you, Judge.

17 (Matter concluded.)

18

19 * * * * *

20

21 I certify that the foregoing is a correct transcript from the
22 record of proceedings in the above-entitled matter.

23 /s/ Andronikh M. Barna

December 18, 2022

24 _____
ANDRONIKH M. BARNA

DATE

25